

BEFORE THE NATIONAL LABOR RELATIONS BOARD

TITO CONTRACTORS, INC.

AND

**INTERNATIONAL UNION OF PAINTERS
AND ALLIED TRADING AFL-CIO,
DISTRICT OF COUNCIL 51**

Cases: 5-CA-119008

5-CA-119096

5-CA-119414

5-CA-123265

5-CA-129503

5-CA-134285

**RESPONDENT TITO CONTRACTORS, INC.'S EXCEPTIONS TO THE DECISION OF
THE ADMINISTRATIVE LAW JUDGE**

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EXCEPTIONS

1. Tito takes exception to the ALJ's finding that Tomas Berganza began operating in Tito's interests in opposing union organizing efforts before Maria Sanchez's discharge on October 30. Order at 3, 27.
2. Tito takes exception to the ALJ's finding that Tomas Berganza suspected or knew that James Coates was talking about Maria Chavez when Coates told Berganza that "Maria" signed a union authorization card. Order at 6, fn 7.
3. Tito takes exception to the ALJ's determination that neither David Wyatt nor Mark Wheeler was a credible witness. Order at 8.
4. Tito takes exception to the ALJ's determination that Tito influenced the decision of MES to request the removal of certain employees. Order at 9, 10, 27.
5. Tito takes exception to the ALJ's determination that Tito had knowledge of any protected concerted activity at the recycling facility at the time the employees were discharged. Order at 27.
6. Tito takes exception to the ALJ's determination that the discharge of the five employees was motivated by anti-union animus. Order at 27.
7. Tito takes exception to the ALJ's determination that there was not a legitimate reason for the discharges of the five recycling employees. Order at 25-27.
8. Tito takes exception to the ALJ's determination that the termination of the five recycling employees violated the Act. Order at 27.
9. Tito takes exception to the ALJ's determination that the implementation and/or stricter enforcement of an overtime policy violated the Act. Order at 24-25.
10. Tito takes exception to the ALJ's determination that Tito withheld overtime hours from employees because of their protected concerted activity. Order at 19.
11. Tito takes exception to the ALJ's statement that a determination as to whether or not there was discriminatory allocation of overtime in pay periods other than the one ending November 2, 2013 should be left "to compliance." Order at 19.
12. Tito takes exception to the ALJ's determination that Mauricio Bautista was terminated in violation of the Act, and treated differently from similarly situated employees because of purported protected concerted activity. Order at 24.
13. Tito takes exception to the ALJ's determination that Hernan Latapy and Nestor Sanchez were terminated in violation of the Act. Order at 18, 24.

STATEMENT OF THE CASE

Tito Contractors, Inc. (“Tito”) is a general contracting firm that provides a variety of services, including carpentry, painting, masonry, drywall installation and, during the winter months, snow removal. Tito also has 3 contracts with Maryland Environment Services (“MES”), a state agency, to provide primarily recycling-related and grounds-keeping services at 4 separate facilities throughout Maryland. Tito’s employees include managerial and clerical employees that work at Tito’s Georgia Avenue office, project managers that prepare and submit bids for work and oversee a number of ongoing projects, supervisors and general laborers that perform carpentry and other work, and approximately 50-60 employees that work under the MES contracts.

Recycling Services Pursuant to Contracts with Maryland Environmental Services

Tito’s recycling employees report directly to the facilities to which they are assigned. The contracts between MES and Tito set forth the rates of pay, benefits, work hours and other conditions of employment at each particular recycling facility.

At the Shady Grove recycling center – the subject of this case – Tito employs approximately 29 individuals who work along a conveyor belt and sort recyclable materials, including plastics and glass, as they move along the belt. There are various ‘stations’ along the line. The Tito employees work alongside approximately 2-3 MES employees called “lead sorters,” who help to oversee the stations and who report back to MES about any problems, including any issues related to Tito employees on the line. Tito also employs 1 supervisor at the Shady Grove facility, Tomas Berganza. Although Mr. Berganza supervises all of the other Tito employees at this facility, the MES supervisors retain the authority to dictate the work hours of Tito’s recycling employees and to request that a Tito employee be removed from the facility. Mr. Berganza regularly communicates with MES’ Operations Manager, Mark Wheeler, regarding any concerns or problems at the facility involving Tito employees. When Mr. Wheeler is not present, Mr.

Berganza communicates with David Wyatt, the MES Field Operations Supervisor and Plant Superintendent.

Painting and Carpentry Services

Tito also has contracts with various entities, including state and local government entities and private companies, to perform painting and carpentry services. During the relevant period, Tito employed between 40-50 individuals as painters, carpenters and unskilled laborers (collectively “laborers”) who typically work in crews made up of 2-4 people. The crews are led by supervisors who work alongside the crewmembers. Generally, the crews report directly to jobsites located throughout Virginia, Maryland and the District of Columbia and work at the jobsite until the project is completed, at which point the crew receives a new assignment. Some employees are assigned to longer-term contracts and report to the customer’s location on a daily basis. The laborers are supervised by 2 field supervisors – Fermin Rodriguez and Manuel Alarcon – and a handful of project managers who oversee the projects.

The Union Organizing Campaign of Tito Employees

Tito first learned of the Union’s organizing efforts on or about November 14, 2013 when it received a letter from the Union, which stated “This is a formal letter to inform you of an ongoing and active organizing campaign within your company”. Ex GC 3. The letter identified 35 employees who made up the organizing committee, including Tomas Berganza, the Tito supervisor at the Shady Grove recycling facility. The following day, the Union filed a Petition for Recognition with the NLRB. Ex. GC 2. An R hearing was held on December 2, 2013 and on December 13, 2013, the Regional Director issued a decision and direction of election. *See* Case No. 05-RC-117169. Tito filed a Request for Review, which the Board denied in November 2014. A mail ballot election was held in early March and the votes were counted in November 2014.

On October 18, 2013, approximately one month before Tito learned of the Union organizing effort, 7 painting and carpentry employees filed a complaint in the United States District Court for the District of Columbia seeking, among other things, unpaid overtime wages under the Fair Labor Standards Act (“FLSA”). In early February 2014, the Court conditionally certified the FLSA collective action¹ and, shortly thereafter, court-mandated notice of the lawsuit was sent to current and former Tito employees that fell within the purported class definition. Tito employees at the MES facilities were not and have never been involved in the overtime litigation. Over the next several months, approximately 20 additional individuals joined the lawsuit as opt-in plaintiffs.

The General Counsel’s Complaint and the ALJ’s Order

The General Counsel issued the initial complaint in this matter on July 11, 2014 alleging various violations under Sections 8(a)(1) and (3) of the National Labor Relations Act (“Act”). A hearing was held before Administrative Law Judge Arthur Amchan on several days in August 2014. At the conclusion of the hearing, the record was left open pending the General Counsel’s decision whether to file a complaint relating to the discharge of Mauricio Bautista. On August 28, 2014, the General Counsel filed a separate complaint relating to Mr. Bautista, which was consolidated with the original complaint. A hearing regarding Mr. Bautista’s termination was held on September 11-12, 2014.

The parties presented extensive testimony and documentary evidence relating to the allegations in the complaint, including testimony from three MES employees. On November 4, 2014, the ALJ issued a Decision and found in favor of the General Counsel on each and every

¹ Unlike traditional Rule 23 class actions, where an individual is presumed to be a class member unless he affirmatively *opts-out*, under the FLSA members of the collective action must affirmatively join or *opt-in* to the lawsuit by filing a Consent to Join form with the Court. 29 U.S.C. § 216(b).

alleged violation. As explained below, Tito takes exception to the ALJ's rulings with respect to the discharges of five recycling employees and three construction employees, as well as the ALJ's findings with respect to Tito's issuance of a facially neutral overtime policy that Tito implemented after consulting with counsel.

QUESTIONS PRESENTED

1. Whether the Administrative Law Judge's determination that Tito violated the Act when it discharged five recycling employees is contrary to a preponderance of the evidence and should be reversed? (Exceptions 1-8)
2. Whether the Administrative Law Judge erroneously concluded that Tito violated the Act when it implemented an overtime policy to bring its practices into compliance with the Fair Labor Standards Act after several employees filed a lawsuit seeking compensation for unpaid overtime wages? (Exception 9)
3. Whether the Administrative Law Judge's finding that Tito withheld overtime hours from employees who engaged in protected concerted activity is contrary to a preponderance of the evidence and should be reversed? (Exceptions 10-11)
4. Whether the Administrative Law Judge's determination that Tito violated the act when it discharged Mauricio Bautista is contrary to a preponderance of the evidence and should be reversed? (Exception 12)
5. Whether the Administrative Law Judge's erroneously concluded that Tito violated the Act when it terminated the employment of Hernan Latapy and Nestor Sanchez? (Exception 13)

ARGUMENT

I. STANDARD OF REVIEW OF CREDIBILITY DETERMINATIONS AND FACTUAL INFERENCES

Tito's exceptions to the Order involve challenges to the ALJ's credibility determinations and the factual inferences that the ALJ drew based on undisputed evidence. Although the Board generally does not disturb an ALJ's credibility determinations, it may do so where the "clear preponderance of all the relevant evidence" convinces the Board that those determinations are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950). Here, the ALJ acknowledges that the disputes involving the recycling employees "requires resolution of the contradictory testimony of witnesses." Order at 3. The ALJ continues by stating, "I find no basis for resolving the credibility of the witnesses by virtue of their demeanor when testifying." Order at 4. Instead, the ALJ based the credibility determinations "on the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole." *Id.* Because these determinations are not based on the witnesses' demeanor or anything related to the ALJ's observation of the witnesses, but rather, are based on the ALJ's review of the record, the rationale for providing such extreme deference to an ALJ's credibility determinations does not hold true here. Moreover, the ALJ provides no justification for his credibility determinations. As discussed below, the "clear preponderance" of the evidence demonstrates that the ALJ's credibility determinations are incorrect.

In at least one significant respect, the ALJ's decision regarding the recycling employees does not turn on credibility determinations, but rather, on factual inferences drawn from undisputed evidence. Specifically, the ALJ's determination that Tomas Berganza, the Tito recycling supervisor, stopped acting as a Union promoter/supporter and became an agent of Tito in late October is a factual inference drawn from undisputed evidence. Accordingly, this portion of the

ALJ's decision is not entitled to any special deference as it is the Board's prerogative "to differ with the trial examiner on inferences and conclusions to be drawn from the facts." *Nix v. NLRB*, 418 F.2d 1001, 1008 (5th Cir. 1969). The inferences drawn by the ALJ have no basis in fact, let alone the weight of the evidence and must be discounted.

II. THE ALJ'S FINDINGS AND CONCLUSION REGARDING THE DISCHARGE OF FIVE EMPLOYEES AT THE SHADY GROVE RECLYING CENTER IS ERRONEOUS AND IS CONTRARY TO A PREPONDERANCE OF THE EVIDENCE.

Tito takes exception to the ALJ's determination that discharge of five Tito employees at the Shady Grove Recycling Center was motivated by anti-union animus and violated the Act. The ALJ ignores and discounts significant and undisputed testimony, including the testimony of neutral, uninterested third parties, and reaches conclusions that are contrary to the evidence.

To establish a violation of Section 8(a)(3), the evidence must show that (1) the employees engaged in protected concerted activity; (2) the employer had knowledge of the protected concerted activity; and (3) the employer "bore animus" toward the employees' protected concerted activity. *Camaco Lorain Mfg. Plant*, 356 NLRB No. 143, at 3-4 (2011); *Wright Line*, 251 NLRB 1083 (1980). Even if the ALJ finds that the foregoing elements are met, "an employer may successfully defend by proving that it would have taken the adverse action even absent the alleged discriminatee's union activity." *Wright Line*, 251 NLRB at 8, *see also Music Express East, Inc.*, 340 NLRB 1063, 1078 (2003).

Here, not only did the General Counsel fail to establish the initial showing required to prove a Section 8(a)(3) violation, but the evidence also indicated that Tito would have taken the same action even if the employees had not engaged in protected activity. Specifically, the record demonstrated that (i) Tito Contractors was not aware that the recycling employees had engaged in any protected activity; (ii) Tomas Berganza continued to support the Union until sometime in

December, as confirmed by Union representatives; and (iii) MES requested the removal of four of the employees based on its own independent observations of the employees' performance and on information received from an MES employee, Juana Rosales. The ALJ appears to credit the clearly biased testimony of the five terminated employees, but fails to address the testimony of Manuel Beltran (a Tito employee) and Juana Rosales (an MES employee) and discredits the testimony of MES supervisors Mark Wyatt and David Wheeler without providing any explanation for doing so. The evidence does not support the ALJ's credibility determinations or the factual inferences that he draws from undisputed evidence.

A. There Is No Evidence That Tito Was Aware That The Recycling Employees Had Engaged in Protected Activity

The ALJ's determination that Tito knew that the recycling employees had engaged in protected activity is contrary to a preponderance of the evidence. At one point, the Order states "There is no evidence that Respondent positively knew of the union activities of the discriminatees until November 15, 2013, when the Union identified them in a letter to Respondent." Order at 27. By that time, two or possibly three of the employees had already been discharged. It is also undisputed that the recycling employees did not participate in the overtime lawsuit filed in October 2013 and had no grievances relating to overtime pay.

The ALJ relied exclusively on the knowledge and status of Tomas Berganza, the Tito supervisor at the recycling facility, to impute knowledge of the recycling employees' union organizing activities to the employer. Although ordinarily a supervisor's knowledge regarding Union activity may be imputed to the employer as a matter of law, "[t]here are two narrow exceptions to this general rule: (1) 'when it has been affirmatively established as a matter of fact that a supervisor who learned of union activities did not pass on the information to others'; and (2) when a supervisor is a 'promoter of the Union.'" *Music Express East, Inc.*, 340 NLRB 1063, 1065

(dissenting opinion) (citing *Dr. Phillip Megdal, D.D.S., Inc.*, 267 NLRB 82 (1983) and *Efficient Medical Transport*, 324 NLRB 553 Fn. 1 (1997)). Here, both exceptions apply. Berganza communicated directly with Union representatives, pledged his support for the Union, signed a Union authorization card and helped to garner support for the Union among recycling employees. Berganza and others testified that he did not speak with Tito management about the organizing activities until early December, after he learned that his status as a supervisor precluded his membership in the Union. The Union's own representative testified that Berganza was a Union supporter in early December.

Despite the overwhelming evidence that Berganza was a Union promoter/supporter through early December, the ALJ concluded that "Berganza began operating as Respondent's agent in opposing union organizing before Maria Sanchez's discharge on October 30, 2013." Order at 27. There is no support in the record for this finding, nor does the ALJ reference any evidence or cite to any portion of the record that supports this conclusion.

Both parties presented evidence that Mauricio Bautista, a Tito construction employee and personal friend of Berganza, arranged an October 18, 2013 meeting between Berganza and Sandro Baiza, a Union representative. Tr. 330:2-6, 86:15 – 87:1. Mr. Baiza talked with Mr. Berganza about the Union's organizing efforts:

Q: When you met Sandro, he told you he was trying to organize Tito Contractors, yes?

A: Correct.

Q: And he told you that he was also trying to organize the Tito employees at the Montgomery County Recycling Center, yes?

A: He only told me that he was trying to organize the company of Tito Contractors.

Q: But he asked you to have some employees sign union cards, didn't he?

A: Correct.

Q: And those employees worked for you at MES, correct?

A: Correct.

Tr. 330:13-25. Mr. Berganza was interested in joining the Union. Tr. 469:21-23. According to Mr. Baiza, Mr. Berganza offered to help with the organizing efforts: “He told me he’s with the Union, and any help, I can ask and he can help me.” Tr. 114:1-2. At that meeting, Mr. Berganza signed a union authorization card and agreed to help get employee signatures. Tr. 331:6-8, Ex. GC 72. Mr. Bautista testified that Berganza told him that he wanted to join the Union because Berganza was not happy about how the owner of the company had treated him. T 784:22 – 785:6. Mr. Baiza also asked Berganza if he could get the signatures of recycling employees that he believed were “close with Tomas.” Tr. 114:14-21 (Baiza describing how he selected the individuals who Tomas Berganza would solicit). At the Union’s request, Mr. Berganza spoke with three employees and got them to sign authorization cards. Tr. 337:23 – 338:7.

Similarly, Maria Guerra, a Tito recycling employee, testified that during a phone call between Sandro Baiza and Tomas Berganza in late October 2013, she overheard² the following: “Tomas said, you know, Sandro, that I’m 100 percent with the Union, and I have already signed the card.” Tr. 164:9-10. The Order references other portions of that conversation in which Berganza asked Baiza whether certain employees, including some of the employees who were terminated, had signed Union cards. Order at 6. The ALJ seems to suggest that Berganza was doing so on behalf of management to determine which employees supported the Union. However, Berganza testified that he asked about the other employees because there were rumors that one employee was giving information to the office and “Because I was afraid that she would tell Tito if I would sign the card, because the moment when I signed the card, they told me not to say

² Mr. Baiza put the call on speakerphone so that Ms. Guerra could listen to the conversation, though Mr. Berganza was not aware that Ms. Guerra was present. Tr. 159:24-160:12.

anything until they send a letter to Tito.” Tr. 470:8-20. In any event, Mr. Baiza told him that he could not disclose the names of any employees that supported the Union. Tr. 90:6-8.

About a week later, James Coates, another Union representative, called Berganza and asked him to get 2 more employees to sign authorization cards. Tr. 338:8-11. During the call, Berganza asked whether Coates could share the names of any employees who had signed authorization cards because Berganza was concerned that word of Berganza’s involvement would get back to Tito. Mr. Coates told Berganza that he could not provide him the names of any employees who had signed cards. Tr. 336:19-23. Instead, to be flippant, Mr. Coates told him I can only tell you one name – “Maria” – knowing that there were several Marias that worked at the facility. Tr. 337:14-16.³

The Order also incorrectly states that “[Berganza] testified that at some point he stopped cooperating with the Union, for example, by not answering telephone calls from the union organizers.” Order at 3. This significantly mis-states Berganza’s testimony. Berganza testified that, at some point in November, he decided that he no longer wanted to try to recruit employees to sign Union authorization cards. In response to questioning from counsel for the General Counsel, Berganza testified as follows:

Q: [James Coates] asked you to sign up Alicia Reyes and Sylvia Sandino, yes?

A: Alicia Reyes and Sylvia Sandino.

Q: But you no longer wanted to help, correct?

THE INTERPRETER: I’m sorry?

Q: You no longer wanted to help do it?

A: Correct.

Q: You no longer wanted to pick up your phone when they would call, yes?

³ Footnote 7 of the Order states that “Berganza suspected or knew Coates was talking about Maria Chavez.” However, the record citation that accompanies this finding does not support the conclusion. To the contrary, Berganza explained that there were several employees named “Maria” who worked at the recycling facility, including Maria Sanchez – the first recycling employee who was terminated. Tr. 337:14-16.

JUDGE AMCHAN: When who called?

Q: BY MR. GODOY: James or Sandro.

A: Only James called me, and I did not answer.

Tr. 338:12-23. Berganza also testified that the reason he no longer wanted to help get authorization cards was because he was afraid that word of his involvement would spread and make its way back to Tito management. Tr. 340:14-25.

In any event, the Union's subsequent conduct refutes the ALJ's finding that Berganza stopped supporting the Union in late October. For example, on November 14, 2014, the Union sent Tito a letter that identified Tomas Berganza as a member of the organizing committee. Ex. GC 3. Sandro Baiza also told Mauricio Bautista to invite Mr. Berganza to a Union meeting at the end of November, though Mr. Bautista never did so.⁴ Tr. 539:19-2, 800:4-8. Nonetheless, Sandro Baiza continued to view Mr. Berganza as a union leader:

Q: So as of December 3, 2013, you considered him a leader of the organizing effort; is that correct?

A: I would say yes, because, I mean, he helped to sign those cards.

Tr. 122:6-9. It wasn't until sometime in mid-December that Mr. Berganza's involvement in the organizing efforts waned and that he first learned that supervisors could not join the Union. Tr. 472:1-11.

Yasmin Ramirez, another Tito recycling employee who was one of the five discharged employees, also testified that, as far as she knew, the organizing campaign at the recycling center began in late October 2013 when Tomas Berganza handed out union cards to some of her co-workers and was trying to get support for the union. Tr. 535:11:7. She also testified that at the

⁴ According to Mauricio Bautista, he decided not to invite Tomas Berganza to the November 23, 2014 meeting because Mr. Bautista heard from other employees at the recycling facility that they did not like Tomas Berganza and that he was a bad supervisor. Tr. 801:3-11.

end of October 2013, several of her co-workers told her that Berganza was trying to get support for the Union. Tr. 535:11-536:7.

Finally, Tomas Berganza testified that he never told any of his supervisors that he was talking to the Union. Tr. 470:21 – 471:8. Similarly, Kenneth Brown and Alex Pierola testified that they did not know about the Union’s organizing efforts at the recycling facility until they received the November 14, 2013 letter from the Union. Tr. 1325:15-19, 1467:15-20. Thus, the evidence – including the testimony of the Union representatives and the Union’s own actions in identifying Berganza as a member of the organizing committee in mid-November - clearly established that Berganza supported the Union until at least early December when he first learned that his supervisory status precluded him from joining the Union.

The ALJ’s conclusion that Berganza stopped supporting the Union and began operating as an agent of Tito by late October is not supported by the record. In fact, even the Order is inconsistent in this regard. Initially, the ALJ states that Berganza “was no longer interested in joining the Union or assisting it by early November.” Order at 5. The Order continues, “Tomas Berganza may have changed his mind when he learned that he was a statutory supervisor and thus unprotected by the provisions of the NLRA.” Order at 5. According to Berganza’s testimony, he was not aware of the significance of his supervisory status until late November or early December when he met with counsel for Tito. Tr. 472:1-11. Berganza also testified that, although he had several conversations with Mauricio Bautista, Sandro Baiza and James Coates about the Union, none of them ever told him that he could not be a member of the Union. Tr. 471:23-25. Neither Bautista, Baiza nor Coates refuted this point in their testimony. Thus, the ALJ initially appears to acknowledge that Berganza’s support for the Union did not cease until November or early December. However, later in the Order the ALJ reverses course and concludes – without citing

any evidence in the record – that Berganza stopped supporting the Union sometime in late October before the first recycling employee was discharged.

B. The ALJ’s Determination That The Discharges Were Motivated By Anti-Union Animus Is Contrary to a Preponderance of The Evidence

Tito also takes exception to the ALJ’s determination that the five discharges were motivated by anti-union animus. The ALJ concluded that “the Respondent’s termination of these employees . . . were also motivated at least in part by the discriminatees’ union and other protected activity (e.g. Chavez’s complaining directly to MES about the goggles).” Order at 27. The Order does not cite to the record or reference any evidence that supports this conclusion. The ALJ does not even attempt to explain the basis for his finding that the terminations were motivated by anti-union animus.

The *only* anti-union evidence proffered by the General Counsel relating to the recycling employees was the self-serving testimony by the terminated employees that Tomas Berganza made anti-union statements during four of the five termination meetings.⁵ However, this testimony is not credible because (1) at the time of the terminations, Tomas Berganza actually supported the Union; and (2) their testimony was refuted by Manuel Beltran, another Tito employee who was present during several of the meetings and who testified that Berganza never made any anti-union statements during those meetings. The ALJ altogether ignores Beltran’s testimony.

With the exception of Yasmin Ramirez, all of the terminated employees claimed that when Tomas Berganza notified them of their terminations, he also made anti-union statements. Ms. Ramirez never testified that Mr. Berganza made any such comments. *See, e.g.*, Tr. 525:11 – 24

⁵ It’s not clear whether the ALJ credited the testimony of the employees on this point as the Order contains no explanation for the ALJ’s determination that the discharges were motivated by anti-union animus.

(Ramirez describing her meeting with Tomas Berganza). Ms. Ramirez also confirmed that Manuel Beltran is often present when Tomas Berganza has to advise an employee of disciplinary action.

Q: Now, you've said that on December 6th, when you had the meeting with Tomas in his office, Manuel Beltra was there also, right?

A: Yes.

Q: Okay. And Manuel is a Tito employee, right?

A: Correct.

Q: And it's not – well, he usually asks – he usually acts as a witness whenever Tomas is going to discipline an employee, right?

A: Correct.

Q: How do you know that?

A: Because Tomas always calls out for him whenever he was going to discipline someone, and many occasions I seen that.

Q: You've seen Manuel in the office with Tomas while he's talking to another employee?

A: Yes.

Tr. 542:20-543:10; *see also* Tr. 1397:9-12 (Beltran testifying that Tomas Berganza always asks him to be present in case some sort of disrespectful comments are made). Manuel Beltran testified that he was present when Tomas Berganza told Aracely Ramos, Yasmin Ramirez and Reyna Sorto of their terminations. Tr. 1397:3-8. He recalled certain details from the conversations between Tomas Berganza and the three women during those meetings. Mr. Beltran also testified that Mr. Berganza did not make any comments about the Union during those meetings. Tr. 1400:7-14, 1401:25-1402:5, 1404:1-6. Mr. Beltran's testimony should be credited as there is no basis to disbelieve anything he testified about.⁶ Similarly, Sandro Baiza, the Union representative who regularly interacted with the employees, testified that the terminated employees never told him that Tomas Berganza made any anti-union statements. Tr. 109:8-23. It is incredible that the

⁶ Mr. Beltran had also signed an authorization card and supported the Union. He is not a supervisory employee.

employees would have neglected to mention this significant detail to Baiza when they talked with him about their terminations.

There is no evidence of anti-union animus whatsoever. In fact, the record shows the opposite – from day one, most of the workers did not like their supervisor Tomas Berganza. When workers first met with Sandro Baiza, they complained about the way they had been treated. Aracely Ramos testified that she complained about Mr. Berganza and that he discriminated against the workers “because of everything.” Tr. 210:21-211:10. When the workers signed the Union authorization cards, they were told that the Union would protect their jobs and they couldn’t be fired. Tr. 614:3-7 , 647:16-24. When they lost their jobs for legitimate reasons, they blamed their supervisor and concocted false ‘anti-union’ statements by Tomas Berganza in an effort to show that their terminations were motivated by their participation in Union activity. The employees’ testimony regarding these alleged ‘anti-union’ statements is not credible and was specifically refuted.

C. The ALJ Incorrectly Concluded that Tito Failed to Show That The Employees Would Have Been Terminated Regardless of The Protected Activity.

Tito takes exception to the ALJ’s determination that Tito failed to show that it would have discharged the employees regardless of their protected concerted activities. Tito presented evidence, which the ALJ credited, that MES requested the removal of four of the five employees for performance related reasons. Order at 26. Pursuant to its contract with MES, Tito was obligated to remove an employee when requested to do so by MES:

3.3.2 MES shall have the right to request that the Contractor replace certain of the Contractor’s employees. The Contractor will replace such employees by the start of the next business day following verbal notification from the MES supervisor.

Ex R-1 (Scope of Services, Section 3.3.2). The contract does not require that MES provide anything in writing or even an explanation for its request. If Tito failed to comply with a request from MES to remove an employee, MES could have terminated the contract:

3.3.4 Non-conformance with any material requirements or performance parameters of this scope of services or MES contract general conditions shall be cause for termination of the contract.

Ex R-1 (Scope of Services, Section 3.3.4). Although there was some ambiguity about whether MES formally requested that the fifth employee – Maria Elena Chavez – be removed from the facility, there is no real dispute that Ms. Chavez was terminated because of her verbal altercation with another employee, that MES approved of this action and that MES would not allow Ms. Chavez to work at the facility again.

1. MES's increased concerns with plant productivity and employee performance

Mark Wheeler and David Wyatt, MES Supervisors, explained that they were particularly concerned with employee performance during this period because of a meeting with Montgomery County regarding the plant's decreased production:

And in our meetings with Montgomery County they – Mr. Kusterer told us that he noticed that our production level seemed to be slipping and that we weren't producing the 18 to 20 a day; we were producing, you know, right around 15 or so a day, and was wondering what, if any issue was causing that.

Tr. 693:13-18.⁷ In addition, because MES is compensated based, at least in part, on its production, when the plant produces fewer 'bales' of recyclable materials, MES receives less money. Tr. 467:14-20.

Sometime after the meeting with Montgomery County but before any of the terminations, a productivity test was implemented to determine how many hoppers each Tito employee could

⁷ Mr. Kusterer is the Program Manager for the Montgomery County Division of Solid Waste. Tr. V4 664:13-14 (Wheeler).

fill when working at station 37a.⁸ The results of the test were recorded in a spreadsheet kept by Berganza. The ALJ notes that the five terminated employees were not particularly low scorers and, in fact, some were among the top scorers on the test. Order at 7. The ALJ also notes that, although Mark Wheeler monitored the performance of some of the terminated employees, he did not monitor the performance of the low scorers. *Id.* Because MES did not request the removal of the low scorers, the ALJ seems to discredit MES's testimony that the four employees at issue were removed for performance-related reasons. This conclusion mis-states the reason why these particular employees were discharged. For example, Mr. Wheeler testified that he observed Reyna Sorto working slowly, but that she would increase her pace once she became aware that Mr. Wheeler was monitoring her performance:

When you walk around the mezzanine at the facility, there's a corner, and if I stood around that corner for – and they didn't know I was there, Ms. Sorto, she would work at whatever pace she was working at, and as soon as she saw me, her pace would pick up and improve noticeably.

Tr. 711:13-18. Thus, Ms. Sorto's performance on the productivity test is irrelevant – because it was not an accurate measure of how she consistently worked. She worked slower when nobody was watching and only increased her pace when she noticed that Wheeler was monitoring employees. Similarly, Mr. Wheeler requested the removal of Yasmin Ramirez because she was “scooping” material on the sorting line, which introduces contaminants into the product that was being sorted. The issue with Ms. Ramirez's performance had nothing to do with how quickly she was working. The evidence also conclusively established that Ms. Chavez (the highest performer on the productivity test) was terminated because she got into a verbal altercation and threatened Juana Rosales, an MES employee. Under the circumstances, the results of the productivity test

⁸ At station 37a, an employee's individual performance can be measured based on the number of large containers, called hoppers, she fills with recyclable materials during her shift. The tests were conducted between September 9 and November 27, 2013.

were not particularly relevant and, understandably, played no role in the decision to terminate these employees.

2. The record does not support the ALJ's determination that Tito influenced MES's decisions to request the removal of the employees.

After deciding not to credit *any* of the testimony of the MES supervisors, the ALJ then states that Tito must have played a role in influencing MES's decisions. Specifically, the Order states

This record shows that all the information that Mark Wheeler and David Wyatt, both of whom speak little or no Spanish, based their removal requests, came from Tomas Berganza. Thus, each of these requests was influenced by Respondent's anti-union animus.

Order at 27. This conclusion is not supported by the evidence. Nor is the ALJ's conclusion a reasonable inference. The ALJ even acknowledges that his conclusion is inconsistent with Berganza's efforts on behalf of Yasmin Ramirez to have her remain employed and transferred to a different facility after MES requested her removal from the Shady Grove recycling facility. Order at fn 15. Moreover, there is no evidence that any of the information that Berganza provided was false or that he targeted these employees or selectively decided to provide information regarding certain employees but not others.

MES's request to remove the employees emanated from their own observations and information from MES's lead sorters. Mark Wheeler periodically monitors the performance of employees, including MES employees, from the observation deck (also referred to as the mezzanine) or through his lead sorters who work alongside the other workers. Tr. 691: 22-692:6; 696:18-25. He also occasionally keeps notes regarding his observations in his Day Timer. Tr. 698:14-19, Ex GC 48A, GC 48B. The notes in his Day Timer regarding employee performance include notes that pre-date the Union's organizing efforts at the recycling facility and that relate to

employees other than those who were discharged. Ex GC 48A. Elsie Bargas, a Tito recycling employee who the General Counsel called as a witness, testified that “Every now and then, not always, maybe like twice a month, [Wheeler] goes to the second floor just to look, to see how we work.” Tr. 649:1-3.

The ALJ also incorrectly concluded that “MES rarely requested that Respondent remove an employee prior to October 30.” Mark Wheeler’s testimony established that, in the last three years, he had requested that Tito remove about five employees from the facility, which included 2 of the employees at issue in this case.⁹ Tr. 689:24-3. Respondent also presented evidence that in the months before and after the five employees at issue were discharged *other* employees were also discharged. Specifically, the record establishes that:

- In January 2013, Andrea Monroy was terminated because she got into a fight with another employee. Tr. 483:3-25, Ex. GC 82.
- In April 2013, Sandra Melgar was terminated after MES requested her removal for poor performance. Tr. 489:23-490:8. Mr. Wheeler’s Day Timer also contains various notes in January, February and April 2013 regarding Ms. Melgar’s performance. Ex. GC 48A.¹⁰
- In January 2014, Karen Hernandez was terminated based on her repeated absences from work. Tr. 493:3-494:12; Ex. R6.

⁹ Wheeler requested that Tito remove Yasmin Ramirez and Reina Sorto. David Wyatt requested the removal of Maria Sanchez and Aracely Ramos.

¹⁰ The ALJ concluded that Melgar was treated differently than the employees in this case because Mr. Wheeler observed her performance for three months before requesting her removal. Order at 26. However, as previously stated, MES became more concerned with employee performance after its meeting with Montgomery County highlighted issues with the plant’s productivity. Moreover, Mr. Wheeler observed Ms. Ramirez during October and November before requesting her removal in December. Tr. 716:20-22; Ex. GC 48.

- In April 2014, Anely Cavallini was terminated based on poor performance. Tr. 490:9-24. Ex. R5.

These terminations show that the five employees at issue were not treated differently because of any protected concerted activity; however, the Order does not address these other terminations. Nor does the ALJ address the possibility that, if the discharges had been motivated by anti-union animus, Tito could have simply discharged the five employees on its own, without involving MES, as it did with Andrea Monroy, Karen Hernandez and Anely Cavallini.

3. Tito presented substantial, credible and unrefuted evidence regarding the basis for each employee's termination.

The Order's discussion regarding the reasons why each employee was terminated glosses over significant evidence and, in some cases, totally disregards compelling testimony. Moreover, the ALJ appears to credit the testimony of the five employees, notwithstanding serious problems with their credibility.¹¹

a. Maria Raquel Sanchez

David Wyatt requested the removal of Maria Raquel Sanchez based on her performance – specifically, she was picking slowly. Tr. 751:12-17. Mr. Wyatt also testified that the decision to remove Ms. Sanchez was based on concerns that she was teasing coworkers. Tr. 751:20-22. In particular, Juana Rosales testified that other employees overheard Ms. Sanchez calling her a “whore.” Tr. 1388:6-22. When Tomas Berganza spoke with David Wyatt, “He [David Wyatt] told me that Norma and Juana told him that Raquel called her son of a bitch” and that Mr. Wyatt told him “To take her out, that he didn’t want anyone there with that attitude.” Tr. 348:5-9. Tomas Berganza’s October 30, 2013 email to Stedson Linkous, a Tito office employee, reiterates that

¹¹ This contrasts starkly with his quick dismissal of Mark Wheeler and David Wyatt’s testimony for minor inconsistencies or their inability to remember certain details.

David Wyatt asked for Ms. Sanchez's removal because of a lack of respect for coworkers and because "she is a slowly worker." Ex. GC 15. At MES' direction, Tito terminated Ms. Sanchez's employment on October 30, 2013.

Juana Rosales and David Wyatt (both uninterested, third-party witnesses) and Tomas Berganza all testified consistently regarding the facts surrounding Ms. Sanchez's discharge. However, the ALJ discredited all of this evidence, apparently, because David Wyatt could not specifically recall certain details from conversations he had relating to Ms. Sorto 10 months earlier when he asked for her removal. Order at 8. The ALJ also concludes that "any information that Wyatt received about Sanchez came from Berganza." Order at 9. The ALJ does not cite to any evidence to support this finding, which is refuted by a preponderance of the evidence. As discussed above, the evidence conclusively established that Berganza supported the Union in late October and would not have selectively targeted an employee for discharge because she also supported the Union.

b. Aracely Ramos Calatan

On October 31, 2013, David Wyatt requested the removal of Aracely Ramos Calatan based on her poor performance. Tr. 752:5-16. According to Mr. Wyatt,

Aracely was discharged for low performance. At some time in October 2013, Norma and Juana [MES line employees] spoke to me, and told me that she was letting materials bypass her on the sorting line in order to bother her coworkers . . . This meant that she was passing the burden of sorting materials on to her coworkers. I spoke to Tomas about this. I asked him to talk to Aracely and find out what was going on. Tomas reported to me that Aracely admitted the conduct and said that she did it to aggravate her coworkers. I then decided that we no longer wanted her on the job.

Tr. 753:6-17. Ms. Rosales also testified about her complaints relating to Aracely Ramos. Tr. 1385:13-1387:15. An October 31, 2013 email from Tomas Berganza to Davys Ramos (a Tito office employee) and a memorandum that he prepared confirm that Ms. Ramos was terminated

because she was intentionally letting material pass on the line. Ex. GC 17, 18. Mr. Berganza also recalled that, during the termination meeting, Ms. Ramos made a comment about the plant exploding and that her representative would be coming to the plant. Ex. GC 17, Tr. 367:14-20. Although Ms. Ramos denied ever making such comments, Tr. 203:14-23, Manuel Beltran also testified that Ms. Ramos told him that she was going to come back to the plant after being fired and that she has her lawyers. Tr. 1403:9-16.¹² At MES' direction, Ms. Ramos was terminated on October 31, 2013.

The ALJ arbitrarily decided not to credit Wyatt's testimony that Norma Garcia and Juana Rosales told him that Ramos was letting material bypass her. Order at 9. The ALJ also finds that "all of Wyatt's information about Ramos came from Berganza." Order at 10. However, there is no indication that the information Berganza provided was false – for the most part, he was simply conveying information that Juana Rosales had shared with him. Rosales testified that she complained about Ramos. The ALJ's decision is contrary to the evidence.

c. Reyna Isabel Sorto-Garcia

Mark Wheeler testified that he asked Tomas Berganza to remove Reyna Isabel Sorto-Garcia from the facility. Tr. 710:17-711:5. According to Mr. Wheeler, he requested her removal because he noticed that she was working slowly:

Starting back in October, I believe, I had just started noticing that her performance was starting to lag and that she didn't seem to be performing up to the par that she had normally been at. And I let Tomas know, and he observed the same thing that I did.

And we just kind of kept an eye on it for a while. It didn't improve. When you walk around the mezzanine at the facility, there's a corner, and if I stood around that corner for – and they didn't know I was there, Ms. Sorto, she would work at whatever pace she was working at, and as soon as she saw me, her pace would pick up and improve noticeably.

¹² The record also shows that in June 2013, Ms. Ramos received a warning for being disrespectful and calling Tomas Berganza a racist. Ex. GC 19. Mark Wheeler's Day Timer also contains a June 2013 note regarding this incident. Ex. GC 48A.

Tr. 711:7-17. Mr. Wheeler also made contemporaneous notes regarding Ms. Sorto's performance in his Day Timer, including the following note on Oct. 28, 2013: "Observing Reyna Sorto on light sort this week. Performance is unsatisfactory so far, Reyna not consistent. Works hard when being observed then slacks off when no one is watching." Ex. GC 48A. Several pages of his Day Timer also indicate that Mr. Wheeler was observing Ms. Sorto's performance throughout October and into early November. *Id.*; see also Tr. 712:14-16. Emails from Tomas Berganza to Davys Ramos (a Tito office employee) on November 1, 2013 and November 13, 2013 confirm that Mr. Berganza had talked with Ms. Sorto about her performance problems and that MES had previously commented on her poor performance.

On November 14, 2013, Mark Wheeler formally requested the removal of Reyna Sorto. Tomas Berganza sent a contemporaneous note to Tito's office on November 14, 2013, which explains that MES requested Ms. Sorto's removal because of her poor performance and because she was bothering other employees. Ex. GC 25. Ms. Sorto also confirmed that, during her termination meeting with Tomas Berganza, Mr. Berganza told her that "Mr. Mark Wheeler and David Wyatt have decided that you no longer have a job." Tr. 255:6-7.

The ALJ's conclusion that Berganza's testimony about Sorto's performance was inconsistent with Wheeler's testimony is simply false. There is nothing inconsistent in the November 1, 2013 email from Tomas Berganza (in which it informs Tito management that he has been observing Sorto's performance) and Wheeler's testimony (in which he confirms that he had also been observing Sorto's performance). In contrast, Ms. Sorto's testimony was plagued with credibility issues and inconsistencies, which the ALJ, apparently, overlooked.¹³ The ALJ's credibility determinations and conclusion are refuted by substantial evidence.

¹³ Specifically, Ms. Sorto provided contradictory testimony about being transferred to the PET station in an effort to make it seem as though Berganza had retaliated against her. *Compare* Tr. 244:4-6 with Tr. 287:2-9. Similarly,

d. Yasmin Ramirez

In early December 2013 Mark Wheeler requested the removal of Yasmin Ramirez after observing her poor performance throughout October and November. Tr. 716:7-22. According to Mr. Wheeler, Ms. Ramirez was not sorting properly – she was scooping material. “As the material passes the workers, they’re told to just pick the material off, because if you go to scoop it, then you produce – you introduce contaminants into the product that we’re sorting.” Tr. 717:6-9. Mr. Wheeler’s Day Timer provides confirmation that he observed her “scooping” materials on numerous occasions throughout October and November. Ex. GC 48A. His Day Timer also includes the following note regarding Ms. Ramirez “scooping” material: “This behavior was also observed by the lead sorter Juana Rosales & Norma Garcia on several occasions. Juana commented that when she saw Ms. Ramirez doing this she would tell her (Ms. Ramirez) to stop doing that. She would stop and resume this behavior again. Norma agreed with Juana.” Ex. GC 48A.

The ALJ states that “It is unclear why Wheeler decided to monitor Ramirez’s work performance.” Order at 11. However, Wheeler and Wyatt both testified that they began to monitor the performance of *all* employees after Montgomery County officials informed them that the plant’s production had decreased. Tr. 693:9-25. The ALJ’s suggestion that Wheeler’s decision to monitor Ramirez could be related to Tito’s desire to retaliate against Ramirez’s husband, one of the construction employees who filed the overtime lawsuit, is unfounded. Wheeler’s contemporaneous notes in his Day Timer indicate that he observed Ramirez on October 10 – several days before the lawsuit was filed and at least one day before Maximo Pierola learned of

her inability to recall any facts about the Workers Compensation claim that she filed after her termination raised concerns about her credibility. Ex. R 14.

the lawsuit. *See* Ex. GC 48(a); Order at 4 (finding that Pierola was aware that a lawsuit was filed as early as October 11).

On November 27, 2013, Tomas Berganza also sent a memo to Tito's office documenting complaints of Martha Serpas, another Tito employee, about disrespectful behavior by Yasmin Ramirez. Ex. GC 27. A subsequent memo from Tomas Berganza dated December 2, 2013 memorializes MES' request that Yasmin Ramirez be removed from the facility by the end of the week. Ms. Ramirez also testified that, during her termination meeting, Mr. Berganza told her that "Montgomery County and MES, they didn't want me to work there anymore." Tr. 526:5-7. At the direction of MES, Ms. Ramirez was terminated on December 6, 2013.

The ALJ's decision relating to Ms. Ramirez is somewhat muddled. On the one hand, he acknowledges that Berganza did not appear to have any animosity toward Ramirez and even attempted to arrange for her transfer to another facility after MES requested her removal. Order at 12. However, having apparently concluded that Berganza did not contribute to Ramirez's removal, the ALJ fails to adequately explain the basis for his determination that the discharge was motivated by anti-union animus.

e. Maria Elena Chavez

Maria Elena Chavez was terminated on December 13, 2013 after she engaged in inappropriate conduct and made threatening gestures towards Juana Rosales, an MES employee. The testimony from Ms. Chavez, as well as other witnesses, including Juana Rosales, established that Ms. Chavez got into a heated discussion with Ms. Rosales near the end of a work-day after water was accidentally swept from a higher sorting location to the lower area where Ms. Chavez was standing. Ms. Chavez got wet and was visibly upset about it. She confronted Ms. Rosales and both women spoke briefly with Tomas Berganza, who advised them that they should go home

and they would resolve the problem the following day. Tr. 1382:17-20. However, Ms. Chavez continued to make comments to Ms. Rosales and, it appears, confronted her in the locker room area and made, what Ms. Rosales and others perceived to be threatening gestures. Ms. Rosales described the situation as follows:

She [Maria Elena Chavez] was almost upstairs, and I was coming to open the door. And she started again to tell me about the problem with the water. And then I told her that there was no water on her and that she didn't get no water. And then she left, and then she got really almost very close, and she started talking to me and yelling at me . . . We went to the bathroom . . . She kept yelling, and she came in front of me. And I thought she was going to push me or hit me.

Tr. 1383:5 – 18.

Mr. Wheeler and Mr. Wyatt were made aware of the situation the following day and conducted interviews. Tr. 758:20-24. Mr. Wheeler testified that during the interviews, approximately three women told him that Ms. Chavez was being aggressive during the encounter. Tr. 734:11-21. Following those interviews, Mr. Wheeler had concerns about Ms. Chavez's behavior, particularly because this was not the first time she had demonstrated this type of behavior. Tr. 735:2-7.

Mark Wheeler and David Wyatt then met with Tomas to discuss the situation. According to David Wyatt, he told Tomas Berganza "to sit her down and talk to her and let her know that it wouldn't be tolerated." Tr. 759:18-19.¹⁴ Tomas responded by saying that he would have to speak with his office to see what they wanted to do. Tr. 759:4-6. Tomas Berganza testified that the ultimate decision about what to do with Ms. Chavez was left up to him:

Q: With respect to the decision to terminate or remove, am I correct that MES, and either Mark Wheeler or David Wyatt asked for Elena to be removed?

¹⁴ Mark Wheeler testified that he asked Tito Contractors to remove Maria Elena Chavez from the facility, though he couldn't remember the date. Tr. V4 723:17-25 (Wheeler).

A: They didn't tell me that. They just told me that they didn't want a person with that type of attitude in the workplace, but they will leave it up to Tito Contractors.

Tr. 411:20-25. After his conversation with MES, Tomas Berganza contacted Tito's office and reviewed Ms. Chavez's file:

I called the office and I let them know over the phone what David and Mark told me. And Davys Ramos asked me what do I think. She told me that Maria Chavez had many warnings and letters in her file. I told her to send me a copy of the file so I can read it. She sent it to me. I read it. After that, I decided that she needed to be removed.

Tr. 412:10-15. Ms. Chavez's file revealed a history of complaints regarding her interactions with other employees, all of which tended to support the statements from Ms. Rosales and others regarding Ms. Chavez's threatening behavior. Ex. GC 90(a). One of the General Counsel's witnesses, Elizabeth Lemus, testified that she had previously complained about Ms. Chavez and was afraid of Ms. Chavez. Tr. 149:21-8. Mr. Berganza's notes and emails with Davys Ramos regarding Ms. Chavez also confirm the basis for Ms. Chavez's termination. *See* Ex. GC 30, 92, 103. Mr. Wyatt testified that he would object to Ms. Chavez returning to the facility because "the atmosphere is a whole lot better since she's been - - left." Tr. 760:5-14.

Although the ALJ references the altercation between Chavez and Rosales, he appears to dismiss Tito's concerns because Chavez "did not touch Rosales." Order at 14. The ALJ's decision focuses primarily on Chavez's complaints about goggles and statements allegedly made by Stedson Linkous. Order at 13. However, there was no suggestion that Linkous had any involvement in the decision to terminate Chavez. Similarly, there was no evidence that the employees' complaints about goggles played any role in Chavez's termination. It seems that the General Counsel came up with this theory as an afterthought to compensate for the weaknesses in its case and the problems with timing that are described throughout this brief. The evidence relating to the goggles showed that (i) a handful of employees complained about goggles beginning

in September 2013, Tr. V1 193:18-194:25 (Ramos), 518:24-520:10 (Ramirez), 553:17-22 (Chavez); (ii) in response, Berganza told employees that he would try to replace the goggles, Tr. 519:18-19; (iii) shortly thereafter, Tito's safety inspector, Stedson Linkus, came to the Shady Grove facility and proposed solutions to address the employees' concerns with the goggles Tr. 537:19-538:14; and (iv) after the proposed solutions did not resolve the problems, Berganza provided the workers with more comfortable goggles in early October 2013. Tr: 520:21-25. There was no testimony regarding any complaints or issues with the goggles after these replacements were provided in early October 2013.

There is also no evidence in the record that the employees' concerns about the goggles, which Tito promptly and appropriately resolved, played any role in the discharges of the 5 employees at issue. The record does not support any inference or finding that Chavez's participation in complaints about the goggles was a motivating factor in her termination. Rather, her history of inappropriate behavior and her altercation with Rosales caused Tito to terminate her employment.

III. THE ALJ'S DECISION REGARDING TITO'S OVERTIME POLICY IS CLEARLY ERRONEOUS

Tito takes exception to the ALJ's conclusion that Tito's enforcement of its overtime policy violated Sections 8(a)(3) and (1) of the Act.¹⁵ To be clear, this portion of the case relates solely to the implementation or enforcement of an overtime policy that required the employees to obtain management's approval *before* working overtime hours. It does not relate to the way in which

¹⁵ Tito also specifically takes exception with the related portion of the Remedy which would require Tito to cease and desist from "initiating a policy requiring high-level management advance approval of overtime work in response to protected activity, or strictly enforcing such a policy which had not been enforced prior to the filing of a collective action lawsuit or other protected activity." Order at 29.

management carried out the policy or whether the policy was enforced in a discriminatory manner.¹⁶

In October 2013, seven of Tito's construction employees filed a lawsuit under the Fair Labor Standards Act claiming that they were entitled to unpaid overtime wages. There is no dispute that, shortly after the lawsuit was filed, Tito held a meeting with its construction employees and distributed a copy of its overtime policy via a memorandum. The memorandum is addressed to "Hourly Employees" and states:

Management would like to clearly state Tito Contractors, Inc.' wage policy. All hourly employees including supervisors are not allowed to work over (40) forty hours a week unless they have prior written authorization from Kenneth Brown, Maximo Pierola, and Alexander Pierola . . . Compliance with this policy and refusal to work over 40 hours a week without the above written authorization will not be a basis for disciplinary action. All employees and supervisors will be expected to work diligently and productively to perform their task in a timely manner. Any employee with written authorization to work over 40 hours a week will be compensated in compliance with all wage and hour laws.

Ex. GC 7. Alex Pierola reviewed the memorandum with legal counsel before providing it to employees. Tr. 1475:24-1476:8. The policy applied to all painting and carpentry workers and was not limited to the plaintiffs in the overtime lawsuit.

Although the policy had been in existence for several years and makes sound business sense, its sporadic enforcement is what precipitated a lawsuit seeking significant damages for unpaid overtime wages. The policy also brings Tito into compliance with applicable law and regulations under the FLSA.¹⁷ 29 C.F.R. § 785.13, which relates to the FLSA, explicitly provides:

In all such cases it is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed. It cannot sit back and accept

¹⁶ Another portion of the Order deals with "discriminatory and/or retaliatory withholding of overtime work." Order at 19.

¹⁷ Under the FLSA, an employer is liable for payment of overtime wages where it "suffers or permits" the employee to work overtime. 29 U.S.C. § 203(g). Courts "have interpreted this standard as requiring only that an employer 'knows or has reason to believe the employee is continuing to work and the duties are an integral and indispensable part of the employee's principle work activity.'" *Doe v. United States*, 372 F.3d 1347, 1360 (Fed. Cir. 2004). Thus, an employer may be liable for overtime wages even when it does not formally approve the overtime work but nonetheless allows or permits the employee to work.

the benefits without compensating for them. The mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so.

There is absolutely no evidence in the record that the policy was intended to discourage employees from engaging in protected concerted activity or otherwise violated the Act.

Kenneth Brown, Tito's General Manager, testified that the overtime policy at issue was first implemented in 2008 in response to budget concerns on projects in PG County and Baltimore City. Tr. 1310:2-20. At that time – in 2008 – Kenneth Brown also drafted the work authorization form – Ex GC 8 - that is completed when employees obtain approval for overtime work. Tr. 1311:12-19. Mr. Brown also reiterated the concerns that arise when crews work unlimited hours without getting approval from management: “No one in construction could allow that to happen. We’re nothing but simple cost accountants. We have to make more money than we spend. So I could not have an unlimited budget in terms of hours on any job, especially if I can’t get paid for it. That’s nonsensical to think that.” Tr. 1313:19-23.

Moreover, the Tito policy mirrored a requirement that appeared in its contract with Arlington County and Fairfax County. Both of those contracts required Tito to obtain approval from the county before its employees could work overtime hours under the contracts. Tr. 1299:6-22, 1306:11-17; Ex R-15. Tito office and administrative employees are also subject to a policy that requires pre-approval before working overtime hours. Tr. 1255:4-11. The policy at issue makes perfect business sense and is in-line with the requirements of the FLSA.

The ALJ acknowledges that “Respondent has a facially appealing defense to the allegation that it violated the Act by instituting the policy requiring top management approval of all overtime.” Order at 24. However, the ALJ ultimately finds that the policy and issuance of the memorandum violated the Act because (i) it was done in response to protected concerted activity

– i.e., the filing of the FLSA overtime lawsuit; and (ii) there were other ways that Tito could have complied with the FLSA. Quite simply, the ALJ’s analysis makes little sense and punishes Tito for its efforts to comply with the FLSA.

The standard *Wright Line* test – whether the employer would have taken the same action regardless of the protected activity – is not well-suited for situations such as this one. Nothing could be more understandable than Tito’s review of its overtime policies and practices in response to a lawsuit that seeks hundreds of thousands of dollars in damages. The ALJ’s analysis effectively precludes Tito from taking *any* corrective action in response to the lawsuit. The fact that Tito did not strictly enforce the policy before the overtime lawsuit was filed is the very thing that precipitated the lawsuit and the claims for unpaid overtime wages.

The ALJ’s finding that Tito did not proffer a legitimate basis for implementing the policy because “it has put forth no evidence as to why it chose this manner of complying with that statute, as opposed to, for instance, paying them the wages they were entitled to under the FLSA” is not well founded. The ALJ may not substitute his own business judgment for that of the employer and may not insist that the employer choose the *best* possible course of action. The ALJ’s conclusion also overlooks the testimony from Tito’s General Manager that allowing employees to work whatever hours they wanted (and paying them overtime, as the ALJ suggests) is “nonsensical” from a business perspective. Tr. 1313:19-23.

IV. THE ALJ’S FINDING THAT TITO WITHHELD OVERTIME WORK ON A DISCRIMINATORY / RETALIATORY BASIS IS NOT SUPPORTED BY THE RECORD.

Tito takes exception to the ALJ’s conclusion that Tito violated the Act “in discriminating against the 7 employees who were identified as plaintiffs prior to November 2, 2013 by withholding overtime work from them during the pay period ending on that date.” Order at 19.

Tito also takes exception to the ALJ's apparent failure to resolve this issue with respect to the other pay periods at issue and his statement that "I leave to compliance whether or not there was discriminatory allocation of overtime in other pay periods." *Id.*

The General Counsel claimed that Tito withheld overtime work from those employees who engaged in protected concerted activity – effectively reducing their hours. The time records for all of Tito's construction employees were introduced into evidence (Ex GC 10, 10(a) and 10(b)) and summarized in Exhibit A to Respondent's Post-Hearing Brief.¹⁸ Respondent does not dispute that seven employees named in the overtime lawsuit did not work more than 80 hours during the pay period ending November 2, 2013. The same is true for several other employees who were not named in the lawsuit. The records also show that, in the prior pay period – before Tito had knowledge of the protected concerted activity, three of the FLSA plaintiffs also worked less than 80 hours. Moreover, the evidence, including testimony from Tito's own employees, clearly showed that their work hours fluctuated and generally decreased during the winter months. Tr. 1322:21-1323:18, 1004:13-18 ("Normally, for example, in the summertime, when there is a lot of work, you work more hours. It has always been like that."), Tr. 856:5-6 (Geremias Berganza); Tr. 888:22-25 (Sanchez) ("Always during the winter months, the work will decrease."). There is no basis to conclude that Tito withheld overtime hours during the pay period ending November 2, 2013 based on anti-union animus.

Similarly, the payroll records and timesheets show that these employees continued to work overtime hours after the lawsuit was filed. The work hours of these employees were comparable to (and in some cases greater than) other employees – in other words, there was no discriminatory

¹⁸ A copy of this chart is also attached to this brief as Exhibit A. The pay period is two weeks, if an employee has 80 hours they are generally working 40 hours for the week, and hence, no overtime hours, which is over 40 in a work week.

or disparate treatment. Comparing the employees' work hours before the lawsuit with their hours after the lawsuit is not useful or probative. The records confirm that the hours for all of Tito's employees generally decreased in the winter months, largely because the company's busy season consists of painting schools during the summer months. However, even during the winter and early spring months, Jose Amaya, Roberto Ayala and Jose Jimenez, for example worked more than 80 hours/payperiod – frequently more than several of the other employees:

EMPLOYEE NAME	12/14/2013	12/28/2013	1/11/2014	1/25/2014	2/8/2014	2/22/2014	3/8/2014	3/22/2014	4/5/2014
Roberto Ayala	87.5	81.5	84	90	80	92	87	97	96
Jose Amaya	78	72	93	40	80	100	88.5	89	78
Jose Jimenez	79.5	81.5	84	88	80	92	87	93	96
Vitalino Berganza	80	65	78	70	76	100	80	80	80
Hector Cortez	80	80	49	76	70	80	80	80	80
Jorge Ramos	81	77	77	91	78	108.5	88	90	88
Manuel Rodriguez	64	80	75	59	80	91	79	74	80

Excerpted from Exhibit A (source: Ex GC 10, 10(a), 10(b)).

Exhibit A also shows that from March 2014 – May 2014, Domingo Zamora consistently worked over 90 hours/pay period (93, 96, 98, 101). During the pay period ending 5/3/14, three employees worked more than 100 hours – Norberto Araujo, Mauricio Bautista and Domingo Zamora. Tito also introduced copies of several Work Authorization forms where management approved overtime hours for the alleged discriminates. Ex. R18(a) – (g). Kenneth Brown testified:

Q: Do you know whether any of the plaintiffs in the lawsuit have worked overtime since October 2013?

A: Yes, definitely so.

Q: How do you know that?

A: Because I approve it.

Tr. 1315:20-24. Davys Ramos, who manages Tito's payroll, also testified that Tito has not denied any employees the opportunity to work overtime since the lawsuit was filed:

Q: Since the overtime lawsuit has been filed, have employees been denied the opportunity to work overtime?

A: No, because they have been formally requesting it before they do it.

Q: Okay. Have there been any employees who requested to work overtime and haven't been allowed to do so?

A: No.

Tr. 1235:21-1236:3. The fact that some of the employees worked fewer hours than they had in the past is not relevant. Tito's workload is driven by customer demand and available jobs. The relevant inquiry focuses on whether the alleged discriminatees received fewer hours than other employees during the operative period – the evidence clearly establishes that they did not.

Testimony from various employees also showed that they had an inflated sense of the hours that they worked *before* filing the lawsuit and their recollection of their hours since the lawsuit was not accurate. For example, Domingo Zamora testified that before the lawsuit he worked more than 40 hours most of the time. Tr. 932:12-18. However, Mr. Zamora's time sheets from 2013 show that he regularly worked 40 hours/week, particularly during the winter months. Ex. R-9.¹⁹ Mr. Zamora also testified that, since the lawsuit was filed, he has only worked overtime on 3 occasions. Tr. 935:20-25. However, the payroll records (summarized in Exhibit A) show that Mr. Zamora actually worked overtime hours during 8 pay periods since the lawsuit was filed. The records unambiguously show that Tito has not withheld overtime hours from any of the employees named in paragraph 18(a) of the General Counsel's Complaint.

¹⁹ As shown by comparison with Mr. Zamora's own personal time records (Ex GC 99), the hours recorded in Ex R-9 are accurate.

The Order is unclear with respect to pay periods *other* than November 2, 2013. There is no finding that Tito withheld overtime in any other pay period (nor would the record support such a finding). However, the ALJ's statement that this decision should be left "to compliance" is inappropriate. As a prerequisite, the ALJ must first determine whether a violation occurred. To the extent the General Counsel failed to meet its burden, the ALJ must find in favor of Tito. That the evidence "is amorphous" does not permit the ALJ to kick the can down the road and delay resolution of the issue.

V. TITO TAKES EXCEPTION TO THE ALJ'S DETERMINATION THAT THE TERMINATION OF MAURICIO BAUTISTA VIOLATED THE ACT.

The ALJ's decision that Tito violated the Act by terminating Mauricio Bautista is not supported by evidence. The ALJ reasoned that Tito "offered no testimony as to why it decided to terminate Bautista as opposed to transferring him back to his job at Arlington". Order at 24. In so deciding, the ALJ substituted his own business judgment for that of the employer. There is no dispute that Bautista mishandled the assignment, and there is no evidence that Bautista was treated differently than any other similarly situated employee. The one job site referenced by the ALJ in Alexandria, Virginia to compare employees mishandling of work is not comparable. At the Alexandria site (St. Gregory Apartments), Tito supervisors had an employee perform electrical work that he was not qualified to perform. Tito does not employ electricians and subcontracts out electrical work. Tr. 1659 (Brown). The employee at issue on the Alexandria job was simply not qualified to do the job he was asked to do. In contrast, Bautista was an experienced carpenter and paid as a senior carpenter.²⁰ Bautista was sent to the Candlewood job solely because of his

²⁰ The other employees on the Candlewood job were less qualified and had a lower job classification than Bautista, who was a supervisor/crew leader and paid as such. Bautista's wage rate was \$17.00 per hour. The other employees at Candlewood referenced in the Judge's decision, Angel Alvarado (helper) was paid \$13.00 to \$14.00 an hour and Jose Granados was paid \$15.50 per hour. Tito had every legitimate right to expect superior performance from an experienced carpenter such as Bautista, compared to an employee at a lower grade.

expertise. Tr. 1653, Tr. 1686. The ALJ's suggestion that Tito's assignment of Bautista to Candlewood was a "set-up" is pure fiction and an inference not based on evidence. Order at 21. The manager in charge of the Candlewood project requested an experienced carpenter (Tr. 1686); Bautista was the most experienced carpenter available for that job. Tr. 1660. The ALJ's suggestion that other employees could have been assigned to Candlewood again substitutes the ALJ's business judgment for that of Tito. It is undisputed that Bautista was an experienced carpenter and that an experienced carpenter was requested for the job. It is also undisputed that Bautista mishandled the job. As such, Tito excepts to the ALJ's decision regarding Bautista's termination.

Bautista's employment was terminated based on his repeated failure to perform basic carpentry work at the Candlewood Elementary School jobsite, and had nothing to do with protected concerted activity. Nor was it motivated by anti-union animus.

On July 24, 2014, Jorge Ramos (the Tito supervisor at the Arlington County facility) told Mr. Bautista that he was needed at Candlewood Elementary School. Although Mr. Bautista had been working at the Arlington County facility for several years, it was not uncommon for him to be assigned temporarily to work at other job sites. Tr. 1510:14-17. In this particular instance, Tito was working at Candlewood Elementary school installing doors and needed an experienced carpenter to help with the project. Tr. 1652:7-12. Up until that point, Milton Antezana had been the main Tito employee at the site, though other workers were occasionally assigned to the project when the need arose. Tito decided to send Mr. Bautista to help Milton Antezana get back on schedule:

Q: And who was it that told you that Mr. Bautista was going to be sent to Candlewood?

A. I was told that by – it was either Tito or Mr. Vivas [a project manager.]

...

Q. Did they say why they were sending Mauricio to the Candlewood site?

A: Yes, because we needed an experienced carpenter out there.

Q: Did you have any concerns about sending Mauricio to that site to do the work that was required?

A: I thought it was a great idea, yeah, no problems. I didn't have any concerns.

Q: Do you know whether they considered sending any other employees?

A: No. When you look at the timelines involved, all my other experienced carpenters were super busy and working six, seven days a week in Baltimore City, because we had major contracts over that had to be finished supposedly by the last of August. So everybody was pretty busy.

Tr. 1653:9 – 1654:5.

Problems arose almost immediately after Mr. Bautista was assigned to the project. He called in sick the first day and never provided a doctor's note, despite being told to do so by Jose Amaya. Tr. 1633:25-1634:5 (stipulation), Ex. R-27. When Mr. Bautista showed up on Monday, he told Antezana that he had never installed a continuous hinge door, but after someone showed him how to do it, he could do the rest. Tr. 1690:1-15. Mr. Antezana was surprised by this comment, but agreed to have a helper show him what to do. According to Mr. Antezana, installing a continuous hinge door is not especially difficult or different from a standard hinge door:

Q: Is installing a continuous hinge something that you need to specialize in or have 30 years of experience to do?

A: No, I don't think so. Any carpenter can hang up that, I guess.

Tr. 1691:18-21. Over the next few days, there were constant problems with Mr. Bautista's performance – he worked at an incredibly slow pace (Tr. 1693:22-1694:3); he came to work unprepared with dead drill batteries (Tr. 1694:8-23); he drilled holes in the door frame that were

not aligned with the hinge (Tr. 1695:6-12). Mr. Antezana²¹ became so frustrated with Mr. Bautista's poor work that he contacted Tito's office and went to speak with Mr. Pierola, Mr. Alarcon and Mr. Brown about the situation. Tr. 1703:8-9. Mr. Antezana's daily reports detail the problems with Mr. Bautista. Ex. R30. At the office, Mr. Antezana explained what happened and showed them the pictures he had taken. Mr. Pierola and Mr. Brown said they would give Mauricio Bautista one more chance:

Q: On the 29th of July, Tuesday, when you met with Manuel Alarcon and Tito, Maximo Pierola, what did they say about continuing to have Mauricio Bautista on the job site?

A: Well, they told me we're going to give [him] one more chance.

Tr. 1743:15-19; Tr. 1670:2-5 ("We discussed it collectively that he had only been there, as I recall, one day or two days, and let's see how it works out. And give him whatever help he needs to make it happen, yeah.").²²

Due to some confusion, Mr. Bautista did not work on the 30th. The next day, July 31st, he worked at Candlewood. Mr. Bautista's problems continued – none of the holes he drilled that day aligned with the hinge and no doors could be hung. Tr. 1711:6-8. Mr. Antezana sent a note to Tito's office along with pictures of the mistakes Mr. Bautista had made. Ex GC 188(b) – (k). He also told the office that if Mr. Bautista returned to the site, Mr. Antezana was going to quit. Tr. 1715:21-25. The mistakes that Mr. Bautista were making were particularly problematic and concerning because they compromised the structure of the metal frame. Fortunately, Mr. Antezana was able to fix the mistakes by patching the holes (though it took almost six hours to fix Mr. Bautista's work on his last day). Tr. 1713:23-1714:16.

²¹ Antezana had no knowledge of any union activity or any protected concerted activity related to Bautista. There was no suggestion that any anti-union animus could be attributed to Antezana.

²² Based on this unrebutted testimony, the ALJ's inference of a "set-up" falls apart.

On August 1, 2014, Tito decided to terminate Mr. Bautista's employment. The termination letter states: "The reason for your termination is your failure to perform basic carpentry duties such as installing door frames and hanging doors at your last job assignment." Ex. GC 188(a). Significantly, Mr. Bautista does not dispute that he made mistakes at the Candlewood project. Tr. 1546:25-1547:4.

The record is devoid of any evidence that Bautista's termination was motivated by any anti-union animus. There was significant passage of time to rebut any inference of anti-union animus with respect to Bautista's efforts to promote the union in 2013. Mr. Bautista held himself out to be an experienced carpenter and was paid as such. He was terminated solely for legitimate business related reasons - - failure to perform adequately.

VI. TITO TAKES EXCEPTION TO THE ALJ'S DETERMINATION THAT HERNAN LATAPY AND NESTOR SANCHEZ WERE TERMINATED IN VIOLATION OF THE ACT.

The ALJ's decision that Tito's terminations of Hernan Latapy and Nester Sanchez were in violation of the Act because they engaged in protected concerted activity is contrary to the unrebutted evidence. At page 18 of the decision the ALJ writes:

On June 25, 2014, Respondent terminated Latapy, ostensibly for refusing to report to work at a job site in Howard County, Maryland. There is no evidence that Respondent ordered Latapy to report to such a jobsite. Thus, I credit his testimony that this never happened.

Order at 18. However, the ALJ completely ignores the unrebutted fact that on June 4, 2014 Tito supervisor Manual Alarcon e-mailed Latapy and told him, "[W]e are trying to communicate with you about returning to work and we have not hear [sic] from you." Ex. GC 97. Latapy admitted to receiving this message and he also admits to never responding to it. Tr. 10943.²³ The message

²³ Nothing in this e-mail message mentions subcontracting, which Latapy testified was the basis of his conversation with Fermin Rodriquez. The e-mail states, in part: "Good morning Hernan we are trying to communicate with you about returning to work and we have not heard from you." Latapy testified that neither Fermin Rodriquez nor Alarcon

instructs Latapy to report to work at Collington, which is a senior living facility where Tito performed work. This un rebutted testimony and evidence simply cannot be reconciled with the ALJ decision, which completely ignores it. The ALJ decision does not hold up when this evidence is considered and the undisputed fact that Latapy failed to respond to the June 4th message to return to Collington warrants reversal of the ALJ decision. The ALJ's attempt to credit Latapy's testimony that the instruction to return to a job site never happened is unavailing, since credibility is not at issue. Latapy admits to receiving the instruction to return to work, which was in writing, and admits that he did not respond to it. The instruction is neither vague nor ambiguous; at the very least Latapy should have made an inquiry to Tito rather than ignore it.

There is also no evidence to support the ALJ's finding that Latapy and Sanchez were terminated for engaging in protected concerted activity. The ALJ is not at liberty to accept only those inferences that support the Union's position and reject all those that support the employer. *See Allentown Mark Sales & Serv. v. NLRB*, 522 U.S. 359 (1998). When the un rebutted evidence is considered, a reasonable fact finder is compelled to conclude that Latapy failed to contact Tito about returning to work, and that work was available for him as of at least June 4th. The ALJ was not free to simply ignore un rebutted evidence to draw inferences which simply could not be drawn.

In late April, 2014 Latapy and Sanchez were working for Tito at the Washington Convention Center under a painting contract.²⁴ Although they had been working at the Convention Center for three months, they worked at several sites throughout the year:

Q: Did you always work at one particular site:

contacted him to let him know he could have his "old position" back. This is contrary to the evidence in that its at odds with GC Exhibit 97. There was no "old position", as Tito no longer had any work at the Convention Center. Cc'd on the e-mail (GC Exh., 97) were management personnel at Tito Contractors, including the owner of Tito and Kenny Brown, COO clearly signifying it was not a subcontractor position.

²⁴ Latapy and Sanchez were assigned to the Convention Center after the filing of the FLSA lawsuit. Their participation in the lawsuit thus had nothing to do with their work at the Convention Center or the contemplated transfer of Latapy from the Convention Center.

A. No.

Q. About how many job sites did you work at in 2013?

A. Many. I think seven to eight different places, counties.

Tr. 1060:19 – 1061:23. Latapy had expertise in painting gym lines, Tr. 1076 and several schools needed gym lines to be painted under a Tito contract. Tito decided to have Latapy paint the school gym lines in Maryland and have another painter, Norberto Araujo work at the Convention Center with Sanchez. The Tito Convention Center contract was not “employee specific,” and did not allow the Convention Center to dictate which Tito employees worked on the project as long as Tito provided the necessary number of employees with the requisite skill level. Tr. 1333:13-322. Immediately upon hearing that he was assigned to paint gym lines at Maryland schools, Latapy spoke with Juan Jimenez, a Convention Center employee who was supervising the Convention Center project. Tr. 1107:7-10, 1076:14-19. Latapy bypassed Tito managers and directly sought to remain at that project with Convention Center personnel. Latapy went to speak with the Convention Center supervisor because he did not want to leave the Convention Center job (which was a wage scale job) and he had convinced Mr. Jimenez (the Convention Center employee) to insist upon Latapy’s continued presence at the job - - even though the Tito-Convention Center contract left it to Tito to decide who to assign the job.²⁵

Juan Jimenez of the Convention Center did contact Tito to inform them that if Latapy was moved from the job, Tito would be “kicked off” the project. Tr. 1332:9-15. Tito informed the Convention Center that it was sending another experienced painter to the Convention Center in

²⁵ Clearly, Latapy was engaging in his own self-interest and not “concerted” protected activity when he sought to remain at the Convention Center. Latapy was the crew leader of the job, and he is the one who informed Sanchez that there was no longer work at the Convention Center. Tr. 881. There is no evidence Latapy was acting out of anything but his own self interest.

lieu of Latapy, as its contract gave them that right. The Convention Center, however, refused and Tito's work at the Convention Center was terminated. Exh. R-19.

Rather than report to the Maryland schools to paint the gym lines, Latapy instead went to Tito's office to persuade Tito that he should continue to be assigned at the Convention Center and that if he was, Tito would get the work back. Tr. 1117:12-16.²⁶ Tito was upset by what they perceived to be Latapy's interference in managing the project. Tito informed Latapy that although work was starting to slow down, it would look to see whether there was a project he could help. Tr. 1119:9-14. Latapy was informed, at the very least, there would be more work in the summer. Tr. 1118:22-1119:8. Indeed, on June 4th Latapy received a message for him to report to work at Collington, to which he never responded.

There is no record evidence that Latapy and Sanchez' employment ended because of anti-union animus or because they engaged in protected concerted activity. Indeed, had Latapy complied with a reasonable work order to paint gym lines in Maryland, and not personally advocate his self-interest to the customer, and not his employer, to remain at the Convention Center, this whole incident would not have occurred. Moreover, the incident at the Convention Center occurred months after the overtime lawsuit was filed, and there is no evidence to support an inference that any of these actions were taken because of anti-union animus or protected concerted activity.²⁷

²⁶ Sanchez didn't show up for work at the Convention Center based on what Latapy, the crew leader told him. Tr. 881:17-20.

²⁷ The ALJ also makes much of Latapy's claim that Fermin Rodriquez told him that Tito would fire the employees after the lawsuit was settled. The ALJ states that when called as a witness by the General Counsel, Fermin Rodriquez "neither denied making the statement nor testified that he had no basis for making the statement." Order at 23. However, the General Counsel did not even make such an inquiry of Rodriquez. (See Volume 6 of Transcript for Rodriquez testimony). Again, the ALJ "infers" that Maximo Pierola informed Fermin Rodriquez "that this is precisely what he intended to do." This inference again ignores the unrebutted evidence that Tito did in fact call Latapy back to work. Of course, Tito could not force Latapy to work, it was incumbent on Latapy to respond to the message to return to work rather than sit back and rely on inferences - - which is what the ALJ would have him do. It is also significant that prior to June 4th, Latapy informed a Tito supervisor that he had three (3) job offers. Tr. 1124:6-9.

CONCLUSION

For all the foregoing reasons the ALJ's decision should be reversed as set forth in these Exceptions.

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of February, 2015, a copy of the foregoing was served via email on the following:

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